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THE NEED FOR SPECIAL VETERAN COURTS

Samantha Walls*

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.¹

- Oliver Wendell Holmes

A Reflection:

This summer I had the privilege to work for the Colorado Public Defenders Office under the Colorado Student Practice Act. I managed my own misdemeanor caseload, under the supervision of an attorney. To my surprise, I discovered that the majority of my clients were veterans, from both the Operation Iraqi Freedom, Operation Enduring Freedom wars, and the Vietnam War. Furthermore, most of the veterans stated that they suffered from Post-Traumatic Stress Disorder (PTSD).

I was unaware of the number of veterans in our criminal justice system. I made it a point to discuss with these clients their service and their readjustment back into society. We discussed their substance abuse issues, their social network, housing, and employment situations.

I, believing I was being innovative, thought that these veterans needed a special court, similar to a drug court. Little did I know that many others shared these same ideas, and in fact, Veteran Courts were spreading across the United States. I was able to shadow the Colorado Public Defender, Sheilagh McAteer, who helped create and run the recently established Veterans Trauma Court, in Colorado Springs, CO. It is from my experience this summer that I write this paper about the problems our veterans face when returning from war with psychological wounds, and the grave need for specialty Veteran Courts across our nation. The United States is not alone in its struggle to address the needs of veterans suffering from psychological wounds. In the current state of international affairs, many countries are joining forces to fight the same war. Therefore, the international community could benefit from addressing the psychological issues of soldiers as a collective group. The United States, in the implementation and progression of Veteran Courts, could lead the international community in providing appropriate treatment and care for its soldiers.

* Article by Samantha J. Walls, Denver Sturm College of Law, Juris Doctorate May 2011. In memory of William Frantz.

1 OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Mark DeWolfe Howe ed., 1963).

We are taught history so that we do not repeat the mistakes of the past. Yet here we are as a Nation, unequipped to care for our returning veterans, in a situation hauntingly reminiscent of the Vietnam War. We are allowing history to repeat itself. Instead of preempting the inevitable stress disorders that afflict soldiers when they return from war, we are now trying as best we can to pick up the pieces. The latest attempt: Veteran Specialty Courts.

The United States has sent approximately 1.64 million voluntary soldiers to serve in the Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF) wars since 2001.² Some of those men and women have returned and some have yet to return home. We welcome soldiers home with open-arms;³ unfortunately, soldiers often find those arms empty and unwelcoming, lacking the sufficient resources and understanding to assist the soldier in his or her transition back into civilian life.⁴ We, as a Nation, have been ignorant to the deep psychological wounds inflicted upon soldiers by the trauma of war.⁵ While there are mounting policy concerns and attempts, both by the government and by the public, to become knowledgeable about the psychological wounds endured from war, for many troops it is too late. The basic fact is that many of our troops have lost their lives to suicide, are already behind bars, or are currently involved in the criminal justice system.⁶

The soldiers' psychological wounds, mainly Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI), affect every aspect of their daily life.⁷ The veterans' behavior, resulting from the symptoms of these psychological wounds, often involves the veteran with the criminal justice system. Once within the criminal justice system, these symptoms may interfere with the veteran-defendant's ability to appropriately interact with the court system. To deal with

2. RAND, CENTER FOR MILITARY HEALTH POLICY RESEARCH, INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY 3 (Terri Tanielian & Lisa H. Jaycox eds., 2008) [hereinafter RAND]. The RAND Corporation is a non-profit institution whose mission is to improve policy and decision-making through research and analysis. See http://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND_MG720.pdf.

3. Thomas L. Hafemeister & Nicole A. Stockey, *Last Stand? The Criminal Responsibility of War Veterans Returning from Iraq and Afghanistan with Posttraumatic Stress Disorder*, 85 IND. L.J. 87, 107 (2010).

4. Erica Goode, *Suicide's Rising Toll: After Combat, Victims of an Inner War*, N.Y. TIMES, Aug. 2, 2009, available at <http://www.nytimes.com/2009/08/02/us/02suicide.html>.

5. See Kristi A. Estrada, *Welcome Home: Our Nation's Shameful History of Caring for Combat Veterans and How Expanding Presumptions for Service Connection can Help*, 26 T.M. COOLEY L. REV. 113, 116-139 (2009).

6. Goode, *supra* note 4 (noting that in 2008, there were 192 suicides deaths among active-duty soldiers and soldiers in inactive reserve status, and that from January to mid-July of 2009, 129 suicides were confirmed or suspected); see RAND, *supra* note 2, at 128 (noting that "male veterans face roughly twice the risk of dying from suicide as their civilian counterparts").

7. Hafemeister, *supra* note 3, at 95; see C. Peter Erlinder, *Paying the Price for Vietnam: Post-Traumatic Stress Disorder and Criminal Behavior*, 25 B.C. L. REV. 305, 312 (1984).

the concerning number of veterans in the criminal justice system, some jurisdictions have recently implemented specialty courts for veterans with criminal charges. These courts are in lieu of the traditional criminal prosecution method, which provide treatment instead of incarceration, as a means to heal the veterans' psychological wounds.⁸

While the effects of TBI on the mental processes are potentially as serious as the effects of PTSD on the mental processes of the returning soldiers, this article will exclusively discuss the relation between PTSD, service in combat, and criminal behavior. Due to the recent medical diagnosis of TBI as a result of war, the extent of the effects of TBI is relatively unknown to medical researchers.⁹ At this point, medical researchers do not have a solid understanding of how TBI affects a veteran's functional activity or how it relates to criminal behavior.¹⁰

The criteria of PTSD include "exposure to a life-threatening or other traumatic event [like combat, rape, or experiencing a natural disaster], a subjective response involving fear, helplessness, or horror, and symptoms from each of the following symptom clusters: intrusive recollections, avoidant/numbing symptoms, and hyper-arousal symptoms."¹¹ A veteran's exposure to a traumatic event during combat causes the development of PTSD. As opposed to civilians who suffer from PTSD after encountering a traumatic experience, PTSD is more severe for veterans because they are exposed to a greater number of traumatic experiences through continuous and unrelenting combat.¹² PTSD symptoms affect the way veterans interact within their social environments.¹³ Anytime an individual suffering from PTSD is reminded of the initial trauma (i.e. through sounds, taste, smells) their body re-experiences the initial stress response.¹⁴ PTSD causes the body to be constantly in an anxious stressed state which has a "deleterious effect on the brain."¹⁵ An individual who suffers from PTSD commonly suffers from other

8. Judge Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW. ENG. J. CRIM. & CIV. CONFINEMENT 357, 363-64 (2009).

9. RAND, *supra* note 2, at summary xx.

10. *Id.*

11. Hafemeister, *supra* note 3, at 94-95.

12. Constantina Aprilakis, *The Warrior Returns: Struggling to Address Criminal Behavior by Veterans with PTSD*, 3 GEO. J.L. & PUB. POL'Y 541, 545 (2005).

13. RAND, *supra* note 2, at 149.

14. Hafemeister, *supra* note 3, at 94-95.

15. Erin M. Gover, *Iraq as a Psychological Quagmire: The Implications of Using Post-Traumatic Stress Disorder as a Defense for Iraq War Veterans*, 28 PACE L. REV. 561, 564 (2008). See Hafemeister, *supra* note 3, at 4 (discussing the chemical process that occurs in the brain of an individual suffering from PTSD as "When an individual experiences a highly traumatic event, the body undergoes a physiological change, that is, a stress response. This stress response begins in the reticular activating system and then progresses to the hypothalamus. The hypothalamus, in turn, signals the pituitary gland to secrete a hormone called adrenocorticotrophic hormone (ACTH). This hormone generates adrenaline, which triggers rapid heartbeat, desensitization, and hyperalertness. Although this is a natural response to a stressful situation, individuals with PTSD may experience a stress response every time there is a reminder of the earlier stressful event.")

comorbid diseases such as depression, substance abuse or an anxiety disorder.¹⁶ In fact, individuals who suffer from PTSD have an average of 2.7 other mental health diagnoses.¹⁷ Moreover, individuals with PTSD commonly abuse substances in an attempt to self-medicate.¹⁸

Individuals who suffer from PTSD require immediate and continuing treatment. The effects of PTSD grow more severe the longer an individual suffers from the traumatic symptoms.¹⁹ Without treatment, people continue to experience symptoms for decades, a condition known as PTSD with lifetime prevalence.²⁰ Fortunately, the effects of PTSD can be reversed through treatment to address the initial traumatic event(s) and by helping the sufferer cope with the stressors of daily life without re-experiencing the feelings associated with the initial trauma.²¹

Part 1 of this article discusses the occurrence of PTSD in veterans, the contributing elements that limit the availability of treatment of veterans with PTSD, and lastly the prevalence of veterans in the criminal justice system. Part 2 discusses the recognized link, both by researchers and courts, between a PTSD diagnosis which results from service in combat and criminal behavior. Part 3 of this article describes and analyzes the proposed adequate way to deal with a veteran-defendant suffering from PTSD: Veteran Specialty Courts.

I. THE PROBLEM

An increasing number of soldiers are returning home from war with substance abuse problems, psychological issues, rising rates of suicide, homelessness, and resulting criminal behavior.²² In recent years, governmental and non-governmental interest groups have begun to study the effects of service in the OEF and OIF wars on the returning soldiers. The RAND group, on behalf of the Center for Military Health Policy Research, completed the first large-scale, non-governmental assessment of the psychological and cognitive needs of soldiers who have served in either the OEF or OIF wars.²³ The researchers concluded that "a major national effort is needed to expand and improve the capacity of the mental health system to provide effective care to service members and veterans."²⁴ Additionally, the Department of Defense Task Force on Mental Health has studied the current available health care for returning soldiers and veterans and concluded that "the

16. RAND, *supra* note 2, at 125.

17. *Id.*

18. *Id.* at 134.

19. *Id.* at 54.

20. GLENN SCHIRALDI, THE POST-TRAUMATIC STRESS DISORDER SOURCEBOOK 40 (Lowell House 2000).

21. RAND, *supra* note 2, at 9.

22. See Gover, *supra* note 15, at 561-62.

23. RAND, *supra* note 2. RAND researchers conducted this studying by surveying 1,965 veterans from across 24 communities. RAND assessed their exposure to traumatic events, studied current symptoms of psychologically illnesses, and evaluated whether they had received proper care for their injuries sustained while in combat. See www.RAND.org.

24. *One in Five Iraq and Afghanistan Veterans Suffer from PTSD or Major Depression*, RAND CORP., April 17, 2008, <http://www.rand.org/news/press/2008/04/17/> [hereinafter *One in Five*].

system of care for psychological health that has evolved over the recent decades is *insufficient* to meet the needs of today's forces and their beneficiaries and will not be sufficient to meet their needs in the future."²⁵

Current treatment and care facilities for veterans and soldiers need to be expanded and improved in order to meet the growing number of soldiers and veterans with PTSD. Some have called the significant increase in the number of soldiers and veterans suffering from PTSD a social crisis.²⁶ The numbers vary depending on the study and its relevant assessment group,²⁷ however, it is estimated that of the current 2.3 million U.S. Veterans, approximately twenty to thirty percent, exhibit the symptoms associated with mental health disorders or cognitive impairments.²⁸ This breaks down to approximately 300,000 of the returning soldiers, or one in five, will likely suffer from PTSD.²⁹ Another study found that out of 100,000 soldiers returning from the OEF and OIF wars that the Department of Veterans Affairs (VA) treated between 2001 and 2005, almost one-third suffered from a mental health problem, most commonly diagnosed as PTSD.³⁰ In that study, more than half of the veterans suffered from a comorbid mental health problem along with PTSD, such as major depression, anxiety or substance abuse.³¹ In fact, one in six soldiers suffers from a substance abuse problem.³² The RAND study concluded that the prevalence of PTSD was highest among soldiers of the Army, Marines and the Reserves because these military forces operate in combat areas more often than other military forces.³³ This finding is consistent with studies that find a recognizable correlation between repeated exposure to combat and the greater likelihood of developing PTSD.³⁴

25. DEPT. OF DEFENSE TASK FORCE ON MENTAL HEALTH, *An Achievable Vision: Report of the Department of Defense Task Force on Mental health*, at ES-1 (2007), *available at* <http://www.health.mil/dhb/mhtf/MHTF-Report-Final.pdf> (emphasis added); Judge Russell, *supra* note 8, at 360.

26. *See One in Five*, *supra* note 24 (discussing the individual and societal health and financial costs associated with veterans and soldiers not receiving the appropriate and effective treatment for PTSD).

27. RAND, *supra* note 2, at 105 (noting the discrepancies in study numbers of veterans suffering from PTSD are due to several factors such as: most studies focused on active duty or enlisted soldiers; the studies under-represent individuals at the highest rates for PTSD, i.e. persons separated from service; most research has been surrounding the deployments prior to the escalation in Iraq insurgency, in 2002-2004; studies only provide information of mental health condition of veteran/soldier at one time, however studies have shown that PTSD symptoms fluctuate over time).

28. *One in Five*, *supra* note 24.

29. *Id.*

30. Sami Beg, *Mental Problems Plague Returning Troops*, ABC NEWS, March 12, 2007, <http://abcnews.go.com/print?id=2944619>.

31. *Id.*

32. *One in Five*, *supra* note 24.

33. *Id.*

34. Karestan C. Koenen et al., *Risk Factors for Course of Posttraumatic Stress Disorder Among Vietnam Veterans: A 14-Year Follow-Up of American Legionnaires*, 71 J. CONSULTING & CLINICAL PSYCHOL. 980, 985 (2003).

A. Elements that Exacerbate the Number of Veterans suffering from PTSD

This section will address the elements, such as the improper care of returning Vietnam Veterans, an arguably different war environment, and significant barriers to treatment that combine to exacerbate the trauma caused by war and effectively increase the number of veterans suffering from PTSD. First, the prevalence of PTSD among Vietnam veterans was not properly addressed after the Vietnam War, and therefore the United States is still trying to provide adequate treatment for Vietnam veterans. The continuing treatment of the Vietnam War veterans is hampering the ability of the United States to focus the treatment resources on the OEF and OIF veterans. Second, the OEF and OIF wars are different from past wars in terms of longevity and enemy tactics. This arguably different war environment has increased the prevalence of PTSD. Lastly, significant barriers prevent veterans from receiving treatment; these failures consist of social stigmatic associations with mental illnesses and systematic failures by the government.

1. PTSD and the Vietnam War

PTSD is a new name for a phenomenon that is as old as war itself.³⁵ The stress related to combat and its resulting psychological effects has been a recognized consequence of warfare.³⁶ During the Civil War, the psychological impact of war was termed "nostalgia"³⁷ In World War I, it was referred to as "shell shock" or "combat neurosis."³⁸ In World War II, the psychological impact of war was called "combat fatigue," "operational fatigue," "old sergeant syndrome," or "gross stress reaction."³⁹ Due to the differing titles and medical diagnosis of combat stress throughout the historical wars, statistics relating to the historical prevalence of the psychological impact of combat stress is difficult to track.

Although society recognized combat stress as a natural consequence of war, the effects of combat stress on veterans was not a focus of societal concern until the end of the Vietnam War. In 1970, Congress held its first hearing to address the issue of veterans' readjustment back into civil society.⁴⁰ It was not until four years following the end of the Vietnam War, in 1979, that the American Psychological Association (APA) officially defined PTSD as a mental disorder.⁴¹ Medical professionals rely on the APA to arrive at a clinical diagnosis.⁴² Thus, Vietnam

35. *Returning Veterans Involved in the Criminal Justice System* 3, Seminar and Training sponsored by Vet Center, Veterans Village of San Diego, Department of Veterans Affairs et al., Sept. 12, 2009 [hereinafter *Returning Veterans*].

36. RAND, *supra* note 2, at 4.

37. Estrada, *supra* note 5 at 134.

38. *Id.*

39. *Id.*

40. RAND, *supra* note 2, at 5.

41. *Id.*

42. Barry L. Levin, *Defense of the Vietnam Veteran with Post-Traumatic Stress Disorder*, 46 AM. JUR. TRIALS 441, § 20 (2010).

soldiers who returned from war and sought treatment for their psychological issues within this four-year gap were not properly diagnosed and did not receive appropriate medical treatment. This contributed to the lack of understanding regarding the proper treatment for these returning veterans.

The United States and the VA did not respond appropriately or with any urgency to the mental conditions of the returning Vietnam veterans.⁴³ The community vilified the returning soldiers for their service, and the media portrayed them as substance-abusing dangerous individuals.⁴⁴ The psychological state of the Vietnam veteran was misunderstood, and many thought that individuals who served as soldiers were predisposed to mental health issues, substance abuse, and criminal behavior.⁴⁵ The current motto for the Vietnam Veterans of America, who are supporters of Veteran Specialty Courts, is: "Never again shall one generation of veterans abandon another."⁴⁶ This motto exemplifies the way in which Vietnam veterans perceived the sufficiency of their care and the general attitude of Americans towards their coming home.

It was not until 1983, eight years after the end of the Vietnam War, that Congress mandated a study to investigate PTSD and other post-war psychological problems among Vietnam veterans.⁴⁷ This study, titled The National Vietnam Veterans Readjustment Study (NVVRS), found that higher levels of war-zone exposure directly increased the rate of PTSD.⁴⁸ Furthermore, it found that 30.9% of Vietnam veterans had PTSD with lifetime prevalence, meaning that Vietnam veterans were, for decades, suffering from PTSD symptoms.⁴⁹

While the results of the NVVRS study primarily put the PTSD diagnosis on the social radar, the federal government did not implement effective treatment services for those Vietnam veterans who were suffering from PTSD. This lack of effective treatment is reflected in the fact that by 1985, almost one-fourth of the federal and state prison populations were veterans.⁵⁰ The government's failure to properly address the mental health problems of the returning Vietnam veterans effectively increased the number of current war veterans needing medical

43. Estrada, *supra* note 5, at 122.

44. Erlinder, *supra* note 7, at 306-07.

45. *Id.* at 314.

46. Thomas J. Berger, *U.S. Sentencing Commission: Regarding Mental Health & Substance Abuse Issues Facing Returning Veterans Relating to Criminal Justice and Alternatives to Incarceration*, Public Hearing, March 17, 2010, http://www.ussc.gov/AGENDAS/20100317/Hearing_Transcript.pdf.

47. Jennifer L. Price, *National Center for PTSD: Findings from the National Vietnam Veterans' Readjustment Study*, U.S. DEP'T OF VETERANS AFF., Jan. 1, 2007, <http://www.ptsd.va.gov/professional/pages/vietnam-vets-study.asp>.

48. *Id.*

49. *Id.*

50. Thomas J. Berger, *Statement for the Record of Vietnam Veterans of America*, before the U.S. Sentencing Commission Regarding Mental Health & Substance Abuse Issues Facing Returning Veterans Relating to Criminal Justice and Alternatives to Incarceration, Public Hearing, March 17, 2010, http://www.ussc.gov/AGENDAS/20100317/Berger_testimony.pdf [hereinafter *Statement for the Record*].

treatment and is exacerbating the current strain on the system. Instead of focusing governmental resources on soldiers and veterans from the OEF and OIF wars, the government is still attempting to treat Vietnam veterans. Vietnam veterans are included in the current statistics of both veterans and soldiers with PTSD, and are included in the statistics concerning the veterans in our criminal justice system.

2. Special Aspects of the OEF and OIF Wars

Changes in the United States military operations have arguably increased the number of mental health related injuries, or “invisible wounds” as described by the RAND study.⁵¹ Some of these changes can be attributed to changes in military operations due to the shortage of volunteer soldiers. The year 2010 marks the ninth straight year of sustained combat for the United States.⁵² Due to the length of the war, coupled with the shortage of volunteer soldiers, more soldiers are experiencing extended and multiple deployments.⁵³ Soldiers often only receive short periods off during deployments, if they receive time off at all.⁵⁴ The government has tapped into the Reserve resources, such as the National Guard, and is deploying Reserves into combat areas without appropriate military training.⁵⁵ Reserve soldiers are more likely to suffer from PTSD due to their lack of traditional military training, which includes psychological conditioning.⁵⁶

Enemy tactics have been changing and fluctuating throughout the OEF and OIF wars which may also increase the prevalence of PTSD. Soldiers must deal with many unknown enemies, because adversaries do not maintain one exclusive identity. The enemy attacks at anytime and anywhere. It is necessary for soldiers to be in a constant vigilante state due to the use of suicide bombers, roadside bombs and improvised explosive devices (IEDs).⁵⁷ A recent news article relayed the views of a sergeant regarding the fluctuating warfare:

Enemy forces are moving away from small-unit infantry attacks against coalition forces. Regime holdouts are moving toward more hit-and-run attacks, using IEDs [improvised explosive devices], mortars or rocket propelled grenades. They are using different tactics so they do not need to engage our forces directly. The number of attacks fluctuates... October saw an average that fluctuated between the mid-teens to low 20's. I think all we need to understand is that with some of these IEDs, all that is required is someone with a paper bag or plastic bag to drop it

51. RAND, *supra* note 2, at 5-6.

52. *Statement for the Record*, *supra* note 50.

53. *Returning Veterans*, *supra* note 35, at 5.

54. RAND, *supra* note 2, at 5-6; *see Responding to the Needs of Justice-Involved Combat Veterans with Service-Related Trauma and Mental Health Conditions: A Consensus Report of the CMHS National GAINS Center's Forum on Combat Veterans, Trauma, and the Justice System*, THE CMHS NATIONAL GAINS CENTER, August 2008, http://www.gainscenter.samhsa.gov/ext/veterans/Responding_to_Needs_8_08.asp [hereinafter GAINS].

55. Aprilakis, *supra* note 12, at 547.

56. *Id.*

57. RAND, *supra* note 2, at 5.

as a walk-by. *I think what it requires is for us to remain vigilant constantly, which is what we are trying to do.*⁵⁸

To deal with the chaos that is modern warfare, the United States has begun using Unmanned Aerial Vehicles (UAVs), or drones. These UAVs have changed the traditional arena of front-line combat into virtual combat. The United States has extensively used drone warfare since the September 11th attacks to suppress enemy army defenses, to support counterinsurgency operations, and to locate and kill enemy targets.⁵⁹ United States Air Force UAV operators remotely control the armed drones, which are located in Iraq and Afghanistan, from military bases within the United States.⁶⁰

While PTSD has primarily been considered a result of face-to-face physical combat, UAV operators may also experience psychological trauma from their “virtual” combat.⁶¹ While the use of drone warfare may appear to be a form of video-game like combat, UAV operators report that the intensity and realness of their work mirrors that of field combat.⁶² Col. Pete Gersten, a commander of the Unmanned Aerial System at the Creech Air Force Base in Nevada, reported:

There’s no detachment. Those employing the system are very involved at a personal level in combat. You hear the AK-47 going off, the intensity of the voice on the radio calling for help. You’re looking at him [a fellow soldier], 18 inches away from him, trying everything in your capability to get that person out of trouble.⁶³

Therefore, although UAV operators are not physically on the front-lines of combat, their work captures all of the traumatic aspects of combat: firing weapons, visually perceiving the effects of combat, hearing the cries of combat, and experiencing the feelings associated with combat. UAV operators also express the psychological difficulties associated with the stress of the job and the quick transition back to a civilian lifestyle, which has been described as a “whiplash transition.”⁶⁴ Furthermore, UAV operators do not have a support network of unit

58. Jim Garamone, *Number of Attacks in Iraq Constant, Enemy Tactics Change*, DEFENSE.GOV, AMERICAN FORCES PRESS SERVICE, Oct. 6, 2003 (emphasis added).

59. Andrew Callam, *Drone Wars: Armed Unmanned Aerial Vehicles*, Int’l Affairs R., Feb. 21, 2010, available at <http://www.iar-gwu.org/node/144>.

60. *Id.*

61. Nic Robertson, *Remote Warfare Ushers New Kinds of Stress*, CNN WORLD, July 23, 2009, available at http://articles.cnn.com/2009-07-23/world/wus.warfare.pilots.uav_1_drones-post-traumatic-pilots?_s=PM:WORLD.

62. David E. Anderson, *Drones and the Ethics of War*, PBS.ORG RELIGION & ETHICS NEWSWEEKLY, May 14, 2010, available at <http://www.pbs.org/wnet/religionandethics/episodes/by-topic/international/drones-and-the-ethics-of-war/6290/>.

63. Maryann Cusimano-Love, *A Troubling Disconnection*, AM. MAG., Mar. 15, 2010, available at http://www.americamagazine.org/content/article.cfm?article_id=12180.

64. Associated Press, *Remote-Control Warriors Suffer War Stress: Predator Operators Prone to Psychological Trauma as Battlefield Comrades*, MSNBC.COM, Aug. 7, 2008, available at <http://www.msnbc.msn.com/id/26078087/>.

cohesion and camaraderie to debrief from the stresses of their jobs.⁶⁵ Due to security controls, UAV operators cannot even discuss the work with their families.⁶⁶ The psychological effects of drone warfare are currently unknown and a potential focal point for future study. However, P.W. Singer, the author of the book *Wired for War: The Robotic Revolution and 21st Century Conflict*, stated “[w]e have 5,000 years in one kind of combat, and we don’t really understand all of the stresses of it, so it’s a little bit arrogant to think that we would understand the stresses of this new kind of combat after only four or five years.”⁶⁷

Higher survival rates in OEF and OIF are the final characteristic that differentiates these conflicts from previous ones. The downside of this good news is the fact that mental health injuries are increasing due to the higher survival rights of wounded soldiers. Advances in technology, advances in body armor, the use of combat medics, faster evacuation times, and the placement of combat support hospitals nearby means that soldiers are surviving from wounds that would have been fatal in previous wars.⁶⁸ The OEF and OIF wars are producing the highest ratio of wounded-to-killed in the United States history.⁶⁹ The ratio of the number of deaths to the number of wounded has dropped from 24% in the Vietnam War, to 13% in the OIF war.⁷⁰ However the wounded, after treatment, are returning to combat zones on average within 72 hours, only three days later, a fact which may also contribute to the onset of PTSD.⁷¹

3. Barriers to Treatment: Stigmatic and Systematic

An increasing number of returning soldiers and veterans suffer from PTSD because of the stigmatic mental health barriers to treatment and the systematic failures by the government. While no easy solution will rectify these problems, simply recognizing they exist is the first step towards eliminating them.

i. Stigmatic Obstacles

The primary barrier to receiving treatment, beyond the time-consuming bureaucratic method of receiving support from the VA, is the stigma associated with mental health issues in both general society and in the military.⁷² Terri Tanielina, author of the RAND study stated in response to the study’s findings, “[w]e need to remove the institutional cultural barriers that discourage soldiers from seeking care. It’s going to take system-level changes to improve treatment for these illnesses.”⁷³ The RAND study concluded that of the 300,000 soldiers

65. *Id.*

66. *Id.*

67. Cusimano-Love, *supra* note 63 (emphasis added).

68. Manav Tanneeru, *Advances Helping More Soldiers Survive Attacks*, CNN.COM, May 22, 2007, available at <http://www.cnn.com/2006/US/11/13/war.wounded/index.html>.

69. RAND, *supra* note 2, at 6.

70. Tanneeru, *supra* note 68.

71. RAND, *supra* note 2, at 6.

72. *Returning Veterans*, *supra* note 35, at 10.

73. Kathleen Kingsbury, *Stigma Keeps Troops from PTSD Help*, TIME, May 1, 2008, available at <http://www.time.com/time/health/article/0,8599,1736618,00.html>.

from the OEF and OIF wars who have reported symptoms of PTSD, only a little more than half have sought treatment either by the VA or other private resources.⁷⁴ Furthermore, the researchers from the RAND group deemed the soldiers' treatment as only "minimally adequate" to properly treat PTSD.⁷⁵

The societal stigma stems from the way society, in general, views mental health treatment. Most of the reported reasons why soldiers will not receive treatment fall into the following categories: they are not convinced treatment will help;⁷⁶ they do not want to be branded as someone with a mental health disorder;⁷⁷ they believe others will think less of them;⁷⁸ or they think a spouse would resent them for seeking treatment.⁷⁹ In fact, one-fourth of the soldiers that participated in the RAND study stated that they did not believe that the mental health treatment would be effective due to the military culture of pushing medications rather than counseling.⁸⁰

The military perpetuates and reinforces the societal stigma against seeking necessary mental health treatment. The military focuses on toughness in both combat training and in survival techniques.⁸¹ The required toughness does not end in training; the military requires soldiers to remain tough throughout their service. The military views anything less than toughness as unacceptable.⁸² For example, in a recent news article, the requisite toughness is evident:

Troop morale *has not* been affected by the increase in casualties. The troops have a tough job and are proceeding to accomplish their missions. These soldiers go out every single day for a year. That's a long time. And in this case, 15 months. That's a lot, that's a lot of pressure over time... So you have to be *mentally and physically tough*, and they *are*.... We have the best noncommissioned officers and soldiers in the world, and they *will* adapt to this. And they *will* continue to do their job.⁸³ – Army Lt. Gen. Raymond Odierno – Commander of Multinational Corps Iraq.

The RAND study also reported that many soldiers believe that admitting their mental health concerns during service to a psychologist or unit command officer would cause problems, such as differential treatment by leadership, a loss of

74. *One in Five*, *supra* note 24.

75. *Id.*

76. *Returning Veterans*, *supra* note 35, at 10.

77. *Id.* at 17.

78. Kingsbury, *supra* note 73 (stating that more than half of the 200 military men interviewed by APA said that they believe others would think less of them if they received counseling, and the majority of surveyed military men stated that they rarely-to-never speak with loved ones about their mental health issues).

79. *Id.*

80. RAND, *supra* note 2, at 278.

81. *Id.* at 276.

82. *Id.*

83. Jim Garamone, *Troops Continue to Adapt to Enemy Tactics in Iraq*, GLOBALSECURITY.ORG, May 31, 2007, available at <http://www.globalsecurity.org/military/library/news/2007/05/mil-070531-afps02.htm> (emphasis added).

confidence by others in their unit, and harmful effect on their future careers.⁸⁴ One soldier shared his view that, "it would be dishonest to promise that 'coming out of the PTSD closet' will be life enhancing."⁸⁵ Others have reported that the unit command officers do not take mental health problems seriously.⁸⁶

While mental health issues are ideally supposed to remain confidential, the unit dynamics makes confidentiality almost impossible. For example, each soldier of a unit must be accounted for.⁸⁷ The on-site facilities for those seeking psychological treatment are only open during the day. One must tell his or her unit officer where they are going at all times. Furthermore, if a soldier seeks a mental health evaluation, another soldier must escort the treatment-seeking soldier to the mental health clinic.⁸⁸ Lt. Justin D'Arienzo, a psychiatrist on an aircraft carrier, speaks about soldiers being hesitant to talk with him in his office for fear of others seeing them.⁸⁹ Instead of office meetings, the soldiers would often casually run in to him in the lunchroom to have a quiet five-minute conversation about their troubles.⁹⁰

Lastly, many soldiers do not seek the appropriate treatment because they fear treatment will have a negative impact on their career. The APA interviewed approximately 200 men and women and an overwhelming 60 percent stated that seeking mental health care would negatively influence their future careers both during and after the military.⁹¹ These perceived harmful effects can have very real effects on soldiers, for example individuals could face stigmatization within the military, their future security clearances could be endangered, promotions could be effected by a history of mental health issues, and it could effectively limit their ability to carry weapons.⁹² Furthermore, soldiers labeled as having PTSD have difficulties in the workplace, even outside of the military. Popular media stigmatizes PTSD as being associated with violence and unstable lifestyles.⁹³

84. RAND, *supra* note 2, at 277.

85. *Returning Veterans*, *supra* note 35, at 17.

86. RAND, *supra* note 2, at 279.

87. *Id.*

88. *Id.*

89. Sadie F. Dingfelder, *The Military's War on Stigma*, AM. PSYCHOL. ASS'N, June 2009, available at <http://www.apa.org/monitor/2009/06/stigma-war.aspx>.

90. *Id.* The DoD Task Force on Mental Health's 2007 Report noted numerous DoD goals to increase the availability and quality of the psychological care for soldiers and veterans. One of those goals was to work towards building a culture of support for psychological health, which include proposals to dispel stigma, increase the accessibility of mental health professionals to service members, to increase training regarding psychological health issues throughout military life, to revise the DoD policies to reflect current knowledge about psychological health, and lastly to make psychological assessments an effective, efficient, and normal part of military life. DEPT. OF DEFENSE TASK FORCE ON MENTAL HEALTH, *An Achievable Vision: Report of the Department of Defense Task Force on Mental health*, at ES-1 (2007), available at <http://www.health.mil/dhb/mhtf/MHTF-Report-Final.pdf>.

91. Kingsbury, *supra* note 73.

92. Dingfelder, *supra* note 89; RAND, *supra* note 2, at 279.

93. *Silent Barriers – On Job Trail, Veterans with PTSD Fight Stigma, Misconceptions*, ALLBUSINESS.COM, 2010, <http://allbusiness.com/print/14064661-1-22eeq.html>.

Therefore, some employers are unwilling to hire someone who admits to having PTSD.⁹⁴

ii. Systematic Obstacles

Systematic failures by the government and military operations hinder the treatment of soldiers and veterans suffering from PTSD, thereby causing the effects of the PTSD to grow more severe over time. Unless soldiers actively seek out treatment during service, at the detriment of their reputation and career, the only time the military screens the soldiers for a mental illness is upon their post-deployment.⁹⁵ As a Department of Defense mandate, the military administers a Post-Deployment Health Assessment to all service members prior to returning home.⁹⁶ The assessment requires completing an online health-screening questionnaire prior to an interview with a mental healthcare provider.⁹⁷ If the mental healthcare provider deems necessary, a referral is made for the soldier to seek outside mental health services.⁹⁸ While this system may be good in theory, many soldiers do not answer the questions accurately or follow the referral because they know it may delay their return home.⁹⁹ The RAND report noted that of those soldiers who received a referral, only approximately one-half sought treatment.¹⁰⁰ Three to six months later the assessment is re-administered to the soldiers through the mail.¹⁰¹ One study reported that from the time of initial assessment to re-assessment, positive screens for PTSD jumped to 42% for those who served in the Army's active duty and 92% for those who served in the Army National Guard and Army Reserve.¹⁰² This jump indicates that it is critically important that the assessments be answered properly and the referrals followed because the longer PTSD goes untreated, the symptoms become more severe.

The VA is the primary avenue for post-deployment care and treatment. However, this administrative agency has arguably been poorly-administered, under-funded, and under-staffed.¹⁰³ A thorough review of the systematic failures of the VA would be a lengthy topic within itself and other authors have extensively analyzed the failures.¹⁰⁴ Nevertheless, in general, the administration of the VA's resources causes significant barriers to treatment for veterans in need.

For example, a veteran's right to VA health benefits is not statutorily authorized but is wholly dependent upon a discretionary budget.¹⁰⁵ Due to the

94. *Id.*

95. GAINS, *supra* note 54.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. RAND, *supra* note 2, at 252.

101. GAINS, *supra* note 54.

102. *Id.*

103. See Estrada, *supra* note 5, at 119-30.

104. *Id.* at 117-141.

105. RAND, *supra* note 2, at 264.

fixed budget, the VA provides treatment based upon a priority system.¹⁰⁶ The priority system establishes accessibility to VA care upon eight priority levels, priority level one being the highest priority to care.¹⁰⁷ Veterans who served in the OEF and OIF wars are automatically eligible to receive cost-free health care through the VA up to five years after military service.¹⁰⁸ These veterans enter the VA system at a priority level of 6.¹⁰⁹ Strategically, in order to receive VA health care as soon as possible, the returning veteran would either attempt to show that PTSD qualifies as a service-connected disability to achieve a first priority ranking, or to qualify as a low-income veteran to obtain a fifth priority ranking. Fortunately, the VA no longer requires the veteran to document his or her traumatic experience which caused the PTSD. Now, the veteran just must prove that he or she served in combat. While this undoubtedly is a step in the right direction, the current priority system is hampering treatment.

Furthermore, the great influx of soldiers returning from war who need mental health treatment is causing a backlog of claims in the VA.¹¹⁰ Veterans often face long waitlists for an appointment.¹¹¹ The Department of Defense has reported that a 30-day delay for an initial mental health appointment is the norm.¹¹² During the wait, veterans still suffer from mental health issues.

Beyond arguably being under-funded, the VA is currently understaffed. The Department of Defense, in 2007, stated, “[t]he DoD [Department of Defense] currently lacks the resources – both funding and personnel – to adequately support the psychological health of servicemembers and their families.”¹¹³ For example, on the U.S.S. Kitty Hawk aircraft carrier, there was only one psychiatrist, Lt. D’Arienzo, on board to attend to approximately 8,000 soldiers.¹¹⁴

B. Lack of PTSD Treatment Correlates with Increase of Veterans in Criminal Justice System

The RAND study suggests that “post combat mental health conditions can be compared to ripples spreading outward on a pond.”¹¹⁵ Without treatment, over time, the symptoms and effects of PTSD on one’s life becomes more severe. Untreated PTSD becomes a substantial interference in an individual’s life.

106. *Id.*

107. *Id.* (explaining priority levels as follows: veterans with service-connected disabilities (priority 1-3); veterans who were prisoners of war (priority 3); veterans with catastrophic disabilities unrelated to service (priority 4); low-income veterans (priority 5); veterans who meet specific criteria such as serving in the first Gulf War (priority 6); veterans with a higher-income who do not qualify for other priority groups (priority 7-8).

108. *Id.*

109. *Id.*

110. *Id.* at 259.

111. *Id.*

112. *Id.*

113. *Id.* at 260.

114. Dingfelder, *supra* note 89.

115. RAND, *supra* note 2, at 149.

Veterans often find themselves in the criminal justice system due to the combination of untreated PTSD and the comorbid substance abuse issues.¹¹⁶

The number of veterans in the United States criminal justice system is substantial. In 2007, approximately 1.6 million inmates were in either state or federal prisons and another 780,000 inmates were confined in local jails.¹¹⁷ Approximately 9.4 percent of those inmates, or roughly 223,000, were veterans.¹¹⁸ Of those veterans in jails or prisons, approximately 60 percent have a substance abuse problem.¹¹⁹

Veterans who are incarcerated in jails and prisons have similar characteristics. The Bureau of Justice conducted the most recent reports in 2000 and 2004. The 2000 report, titled *Veterans in Jail or Prison Report*, concluded that of the prison and jail veteran population sampled, the majority were soldiers who had served in the Army.¹²⁰ It further noted that veterans were more likely to be first-time offenders, more likely to have less extensive criminal histories, and less likely to be recidivists.¹²¹ Lastly, incarcerated veterans were more likely to report alcohol abuse and a mental illness than non-veterans.¹²²

At this point, statistics do not clearly indicate the number of OEF and OIF returning soldiers in the criminal justice system.¹²³ In the 2004 *Veterans in State and Federal Prison*, Stated that only four percent of the prison and jail population was comprised of OEF and OIF war veterans.¹²⁴ Presently, soldiers are still returning from the OEF and OIF wars and therefore the 2004 report does not accurately reflect the current trend of OEF and OIF war veterans involved in the criminal justice system. A more up to date study is necessary to accurately calculate how many OEF and OIF veterans are in the criminal justice system today.

II. RECOGNIZED LINK BETWEEN CRIMINAL BEHAVIOR AND PTSD

Veteran Specialty courts are based upon a premise that veterans' culpability for their criminal behavior is different from the average citizen-defendant. Their culpability is reduced due to their unique experience in combat war, the associated PTSD diagnosis caused by their service, and the behavioral symptoms of that diagnosis that often serve as the catalyst for their criminal behavior.¹²⁵

116. Judge Russell, *supra* note 8, at 358, 362.

117. GAINS, *supra* note 54 (applying statistics from the 2004 Department of Justice Report, released in 2007)

118. *Id.*

119. *Statement for the Record*, *supra* note 50.

120. Christopher J. Mumola, *Bureau of Justice Statistics Special Report: Veterans in Prison or Jail* 3, U.S. DEP'T OF JUST., January 2000, revised Sept. 29, 2000.

121. *Id.* at 7.

122. *Id.* at 9-10.

123. GAINS, *supra* note 54.

124. Margaret E. Noonan and Christopher J. Mumola, *Bureau of Justice Statistics Special Report: Veterans in State and Federal Prison*, U.S. DEP'T OF JUST., May 2004

125. Judge Russell, *supra* note 8, at 363-64.

A. Effect of PTSD on Veterans' Behavior

The effect of PTSD on a veteran's emotional and physical state relates directly to his or her involvement with the criminal justice system. The effects of PTSD impact every element of an individual's daily life.¹²⁶ The initial traumatic event and the re-experiencing of the initial stress response of that traumatic event cause damage to the hippocampus of the brain.¹²⁷ In turn, this damage affects an individual's ability to "manage fear responses [or] to appropriate[ly] react to environmental stimuli."¹²⁸ Therefore, the associated symptoms of PTSD affect the way veterans perceive and respond to their social environment.¹²⁹

Symptoms of PTSD affect three specific domains of functioning: cognition, physiological arousal and emotions.¹³⁰ The noted changes in the three domains of functioning directly link PTSD symptoms to criminal behavior. Some of these common changes are flashbacks of the traumatic event, perceived threats, anger and irritability, avoidance, heightened emotions and emotional numbing.¹³¹ One effect of PTSD is the physiological state, termed Allostasis, wherein someone is constantly hyperactive, aroused, and aware.¹³² This hyperactivity causes an immense strain on the nervous system.¹³³

Furthermore, the veteran's reintegration into civilian life creates complications.¹³⁴ Behavior that is socially acceptable in combat areas may actually be criminal behavior in a civil society. Some veterans have difficulty reintegrating into civilian life because they are used to experiencing extreme highs and lows in combat.¹³⁵ Veterans often become detached and numb once back in civil society.¹³⁶ Many veterans feel that there are very few individuals in his or her immediate social network who could fully comprehend what the soldier's life was like during combat.¹³⁷ Due to the lack of community understanding, combined with the aforementioned stigma associated with mental health issues and the systematic obstacles to treatment, many veterans avoid dealing with their PTSD symptoms.

126. Erlinder, *supra* note 7, at 312.

127. Hafemeister, *supra* note 3, at 96-97. Researchers have concluded, in general, that different brain imaging techniques can prove that an individual suffers from PTSD by showing brain reactivity. However, this has yet to be utilized in clinical settings. Researchers propose that one day this technology will be used to aid in the objective diagnosis of PTSD and assist in monitoring treatment responses for PTSD. Nobumasa Kato et al., *PTSD: Brain Mechanisms and Clinical Implications* 207-08, Springer Pub. (2006).

128. *Id.*

129. U.S. Dep't of Veteran Affairs, *Criminal Behavior and PTSD: an Analysis*, National Center for PTSD (June 01, 2010).

130. *Id.*

131. *Id.*

132. Aprilakis, *supra* note 12, at 551.

133. *Id.*

134. Hafemeister, *supra* note 3, at 104-05.

135. *Id.*

136. Aprilakis, *supra* note 12, at 555.

137. Goode, *supra* note 4.

To overcome the mood-altering symptoms noted above, veterans act out in certain ways that lead to involvement with the police.¹³⁸ Researchers have concluded that some seek out exhilaration by engaging in risky behavior to satisfy their need for stimulation.¹³⁹ Some PTSD sufferers are overwhelmed with anger and irritability; thus, when they are in a situation they perceive to be threatening, the sufferer snaps and overreacts.¹⁴⁰ The NVVRS study reported that veterans with PTSD committed significantly more violent acts than veterans without a PTSD diagnosis, 13.3 violent acts in one year compared to 3.53 relatively.¹⁴¹

A veteran is most likely to engage in criminal behavior during a dissociative state,¹⁴² or while abusing a substance.¹⁴³ During a dissociative state, the veteran behaves as if he is in combat and reacts to elements in his environment in survivor-mode.¹⁴⁴ The veteran's behavior is often strange and violent due to the veteran's distorted reality.¹⁴⁵ Moreover, the veteran is not aware of the morality of his behavior, or the consequences of his actions.¹⁴⁶

Substance abuse and a mental disorder diagnosis go hand-in-hand.¹⁴⁷ Researchers found that between 15%–40% of people with mental disorders also have substance abuse problems.¹⁴⁸ This statistic substantially increases in relation to PTSD, 75% of veterans with PTSD also have a substance abuse problem.¹⁴⁹ Veterans often turn to abusing substances in an attempt to self-medicate to deal with both their psychological state and their physical chronic pain.¹⁵⁰ Others become heavily involved with drugs and alcohol to deal with the stress and guilt associated with survival.¹⁵¹ Traumatic stress, the initial cause of PTSD, also causes relapses in individuals who have overcome substance abuse.¹⁵² A noted symptom of PTSD is re-experiencing the initial traumatic stress. Therefore, this creates a cycle of abusing substances as a means to cope with the PTSD symptoms, and a relapse back into using due to re-experiencing the initial traumatic stress.

The number of veterans with a substance abuse problem is significant. As noted earlier, one in six veterans have a substance abuse problem.¹⁵³ This substance abuse problem directly relates to criminal behavior. In recent years,

138. Erlinder, *supra* note 7, at 311.

139. Gover, *supra* note 15, at 567.

140. Erlinder, *supra* note 7.

141. *Id.*

142. Erlinder, *supra* note 7, at 311.

¹⁴³ *Id.*

144. Hafemeister, *supra* note 3, at 116-117.

145. *Id.*

146. *Id.*

147. RAND, *supra* note 2, at 134.

148. *Id.*

149. *Id.*

150. Erlinder, *supra* note 7.

151. Aprilakis, *supra* note 12, at 555.

152. *Statement for the Record*, *supra* note 50.

153. *Id.*

there has been an increase in the number of veterans involved in alcohol and drug related crimes, such as Driving under the Influence, Reckless Driving, and Disorderly Conduct.¹⁵⁴ One study found that between 2005 and 2006, the rate of veterans involved in the above-noted crimes rose from 1.73 per 1000 soldiers, to 5.71 per 1000 soldiers.¹⁵⁵

B. Recognized Link Between Criminality and PTSD

The behavioral link between criminal behavior and the diagnosis of PTSD is well-recognized by researchers and psychologists. A study of Vietnam veterans noted that the anger and violence by Vietnam veterans was "a reaction stress rather than simply another outburst of a notoriously sociopathic population."¹⁵⁶ Furthermore, a substantial majority of criminal defendants who are veterans have no criminal records prior to their service.¹⁵⁷ The majority of veterans who commit violent crimes or crimes related to drugs and alcohol are first-time offenders; therefore, these individuals are arguably not criminally predisposed.¹⁵⁸

Courts have recognized and incorporated the research that acknowledges a substantial link between criminal behavior and a PTSD diagnosis when assessing the culpability of a veteran criminal defendant.¹⁵⁹ This is most obvious in the language of *Porter v. McCollum*, a recent United States Supreme Court case, which stated that the United States has a "long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines."¹⁶⁰ In this case, the Court held that the defendant's extensive combat exposure was relevant "not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took upon [the defendant]."¹⁶¹

In the above case, the Court recognized the link between PTSD and criminal behavior in terms of an element of consideration for mitigating a criminal defendant's sentence. Likewise, in *State v. Denni*, at the sentencing trial for a 1st degree murder charge, the defendant presented evidence that he suffered from PTSD since returning from Iraq and testified that his actions were a result of the extreme mental disturbance due to PTSD.¹⁶² The jury convicted the defendant for

154. Judge Russell, *supra* note 8, at 363.

155. *Id.*

156. David M. Benedek & Thomas A. Grieger, *Post-Deployment Violence and Antisocial Behavior: The Influence of Pre-Deployment Factors, Warzone Experience, and Posttraumatic Stress Disorder*, 13(3) PRIMARY PSYCHIATRY 51, 52 (2006).

157. Mumola, *supra* note 120, at 7. Table 6 exemplifies that of the state prison population in 1997, 64.1% of veterans had no criminal justice status (i.e. criminal history) at time of current arrest. *Id.*

158. *Id.* (reporting that "nearly a third of veterans were first-time offenders;" and in State prisons "veterans had less extensive criminal histories than other inmates;" "veterans in State prison were less likely than nonveterans to be recidivists").

159. See Gover, *supra* note 15, at 562-63, 570-81.

160. *Porter v. McCollum*, 130 S. Ct. 447, 455 (2009).

161. *Id.* (emphasis added)

162. Gover, *supra* note 15, at 579-80.

the lesser charge of 2nd degree murder.¹⁶³ In fact, some legislatures have recognized the importance of PTSD as a consideration for mitigation by statutorily allowing judges to consider a defendant's PTSD diagnosis during a sentencing trial and to afford appropriate treatment alternatives when necessary.¹⁶⁴

The judiciary has recognized the importance of PTSD as more than just mitigation in sentencing. Some courts have recognized PTSD as negating the required *mens rea* of the charged crime.¹⁶⁵ *Mens rea* is the measurement used by the courts to determine whether the defendant had the requisite culpable mental state to be guilty of the alleged crime.¹⁶⁶ The criminal justice system has recognized that an individual who suffers from a severe mental illness that renders them legally insane does not have the requisite mental state and therefore is entitled to an insanity defense.¹⁶⁷ The same line of argument arguably applies to individuals diagnosed with PTSD. A PTSD diagnosis could support a mental status defense because, as scientific studies have shown, PTSD has a substantial altering affect on an individual's mind.¹⁶⁸

Lawyers have been litigating the PTSD mental health defense since the late 1970s.¹⁶⁹ To raise the defense, counsel for the defense must prove that "but for the PTSD, the crime would not have occurred."¹⁷⁰ This requires many different offers of proof. Counsel must establish that the defendant actually suffers from PTSD.¹⁷¹ To prove that the veteran defendant has PTSD, counsel will have to pinpoint the traumatic event that instigated the PTSD.¹⁷² Many veterans with PTSD do not report their symptoms or seek medical attention; therefore, a medical record to prove PTSD might be difficult to secure.¹⁷³ Evidence to prove the initial traumatic event might be difficult to find due to a lack of documentation of combat occurrences and security measures.¹⁷⁴ Therefore, it might be impossible for the defense to prove the traumatic event without forcing the defendant to waive his right against self-incrimination and testify regarding his traumatic event. Then, counsel must establish that the defendant was suffering from a PTSD symptom at the time the crime occurred. Lastly, counsel must establish the causal link between the experienced symptom and the criminal act.¹⁷⁵

Furthermore, even if counsel successfully completes the above-required steps, it is ultimately up to the jurors to decide whether they believe the defendant's

163. *Id.* at 579-80.

164. Erlinder, *supra* note 7, at 339 (discussing Cal. Penal Code § 1170.9 (1984)).

165. Hafemeister, *supra* note 3, at 123-25.

166. BLACK'S LAW DICTIONARY 1006 (8th ed. 1999).

167. Gover, *supra* note 15, at 570-75.

168. Hafemeister, *supra* note 3, at 96-97.

169. Gover, *supra* note 15, at 562.

170. Levin, *supra* note 42, at § 17.5, 18.

171. Aprilakis, *supra* note 12, at 560-64.

172. Gover, *supra* note 15, at 568.

173. *Id.*

174. *Id.*

175. Aprilakis, *supra* note 12, at 560.

defense.¹⁷⁶ Although the psychiatric community and courts recognize the link between criminal behavior and a PTSD diagnosis, lay individuals may not be as knowledgeable of the link.¹⁷⁷ Furthermore, non-veteran jurors might not empathize or understand the psychological toll that war takes on an individual.¹⁷⁸ Jurors might not believe in a PTSD diagnosis or be weary of a PTSD defense due to the ability to feign mental illnesses such as PTSD.

In the cases where PTSD has been used as a mental health defense, it has primarily been successful where the defendant's criminal behavior could be attributed to a dissociative state.¹⁷⁹ In dissociative state cases, it is easier to prove the direct link between the PTSD symptom, the defendant's lack of mental capacity, and the criminal behavior. Usually a veteran in a dissociative state is acting in survivor-mode, and therefore his actions seem strange in correlation to the reality of the environment around him.¹⁸⁰ It might be easier for a jury to identify and understand this behavior. However, only the minority of criminal cases involve veterans who are in dissociative states.¹⁸¹

The recognition by the courts of a defendant's reduced culpability because of PTSD is a step in the right direction. Yet, it is not enough. For the aforementioned reasons, PTSD defenses are often difficult to prove and are arguably unlikely to gain acceptance by the jury. Sending a veteran to jail is not going to help the veteran's underlying PTSD mental-health issues that led to his or her criminal behavior because the veteran will not receive the necessary treatment. One author put it best:

Although constitutionally and statutorily legitimate, these convictions should be considered a moral blight on the legal justice system. As the Executive branch sends more and more young men and women to Iraq and Afghanistan, the Legislative and Judicial Branches should respond by providing special rules to govern veteran defendants.¹⁸²

III. VETERAN SPECIALTY COURTS

*"The care of human life and happiness, and not their destruction, is the first and only legitimate object of good government."*¹⁸³

Some state legislatures and state judicial branches have responded to the growing number of veterans in the criminal justice system by initiating Veteran

176. Gover, *supra* note 15, at 569.

177. Aprilakis, *supra* note 12, at 560-64.

178. Gover, *supra* note 15, at 569.

179. *Id.* at 573.

180. Hafemeister, *supra* note 3, at 116.

181. *See id.*

182. Aprilakis, *supra* note 12, at 566.

183. Thomas Jefferson to Maryland Republicans. 1809. ME 16:369; *see also* Honorable Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999).

Specialty Courts. Veteran Specialty Courts are courts that use alternative prosecution and sentencing methods to treat the underlying PTSD diagnosis and substance abuse problems. The Veteran Specialty Court does not use the traditional method of charge-conviction-incarceration as this method exacerbates the veteran's mental health issues. This idea has gained wide acceptance in the legal community, and across the United States different versions are springing up.

A. Use of Alternative Prosecution Methods

The Veteran Specialty Court's use of alternative prosecution methods is modeled upon the drug specialty court programs that began in the late 1980s. The year of 1989 offered hope to many veterans and drug offenders. That year exemplified an understanding by the community that the traditional method of prosecution was not helping the local veterans in San Diego, nor drug-users across the United States, to overcome their drug addictions. San Diego established the first Homeless Court Program in that year.¹⁸⁴ The program was instituted by the Misdemeanor Criminal Court to find alternatives to the traditional prosecution of homeless veterans involved in the criminal justice system who suffered from alcohol and drug addictions.¹⁸⁵

Also in that year, the legislature and judiciary in Florida created the first Drug Treatment Court (DTC).¹⁸⁶ After its creation, many drug specialty courts emerged in other urban centers.¹⁸⁷ Drug courts primarily arose due to the overwhelming increase in drug offender incarcerations during the '80's and early '90's. Social media and the government termed the rising drug use and incarceration in America as a "war on drugs."¹⁸⁸ The increase in cases placed an overwhelming burden on the court systems.¹⁸⁹ The legislature initially created drug specialty courts as an avenue to deal with the overwhelming caseload of drug crimes.

The enactment of drug specialty courts showed recognition, on behalf of the criminal justice system, that the traditional method of prosecuting drug crimes was not working to solve the drug-use problem in America. The enactment of drug courts also showed recognition that the prevalence of drugs in society created a public safety concern that needed a response. Recidivism for drug crimes was high,¹⁹⁰ and incarcerating individuals for drug crimes did nothing to curtail the use of drugs, or treat the underlying addiction to drugs.¹⁹¹ The drug specialty courts

184. Katrina J. Eagle & Steve R. Binder, *Veterans Facing Criminal Charges: How a Community of Professionals can Serve Those who Served our Country*, 16 NEV. LAW. 16, 18(2008).

185. *Id.*

186. Honorable Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 545-57 (1999).

187. Judge Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST J. CRIM. L. 563, 568 (2010).

188. Honorable Hora et al., *supra* note 186, at 456.

189. *Id.* at 456.

190. *Id.* at 456.

191. *Id.* at 456.

allowed non-violent drug offenders to choose to participate in an intensive supervision and treatment program, *in lieu* of the traditional prosecution method. The intensive supervision and treatment programs addressed the underlying drug addiction, and helped the individual confront and overcome the addiction through evidence-based treatment.¹⁹² Drug specialty courts produced positive outcomes by reducing costs associated with incarceration, decreasing the overwhelming caseload in misdemeanor courts, and most importantly decreasing the rates of recidivism.¹⁹³

When the drug courts were created, the system of treatment-over-incarceration was primarily viewed as a way to create greater efficiency in the processing of court cases.¹⁹⁴ However, the drug court system has become associated with a contemporary criminal justice ideology called therapeutic jurisprudence. Therapeutic jurisprudence is "the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects."¹⁹⁵ This jurisprudence analyzes through empirical research the direct relationship between the law, the legislature's goal in enacting the law, and the social effects created by the law.¹⁹⁶ This jurisprudence concept was first utilized in 1987 in mental health law.¹⁹⁷ Since then, the criminal justice system used therapeutic jurisprudence, primarily in regards to drug convictions, to justify the movement away from the traditional methods of prosecution, charge-convict-incarcerate, to a model of treatment-rehabilitate.¹⁹⁸ This movement was based upon the recognition that the legislature's goal of reducing recidivism among drug offenders was not being fulfilled, and in fact the court was seeing a rise in repeat drug offenders. The treatment-rehabilitate model worked to reduce recidivism by treating the underlying drug-addiction. The use of therapeutic jurisprudence to address the underlying issues of the criminal behavior necessarily emphasizes the responsibility of the individual to take an aggressive and self-motivated approach to treatment.

B. Foundation of Veteran Specialty Courts

Veteran Specialty Courts utilize the therapeutic jurisprudence ideology in creating the treatment-rehabilitate model. State legislatures have based the veteran courts' foundation on the established infrastructure of the drug courts.¹⁹⁹ These new courts can be considered a merger of both drug court and mental health court in that it provides treatment for both the underlying PTSD and the associated substance abuse concerns.²⁰⁰ Treatment of the mental and psychological well-

192. *Id.* at 463-68.

193. *Id.* at 502-04.

194. *Id.* at 449.

195. *Id.* at 443.

196. *Id.* at 444-48.

197. *Id.* at 443.

198. *Id.* at 449.

199. *See* SERV Act, S. 3379, 110th Cong. § 2 (2008).

200. Judge Russell, *supra* note 8, at 364-65.

being of the veteran-defendant is the number one concern.²⁰¹ In 2004, two judges in Anchorage Alaska established the first known Veteran Court in the United States.²⁰² The judges established the court in response to the concerning numbers of veterans who appeared before them.²⁰³ In 2008, Judge Robert Russell established the second Veteran Court, now the model program, in Buffalo, New York.²⁰⁴ The New York court system pioneered the treatment model for Veteran Specialty Courts. Since then, many state legislatures have created Veteran Specialty Courts incorporating the New York treatment model.²⁰⁵

Although Veteran Specialty Courts have gained support from state legislation, these courts have not been as fortunate on the federal level. During the 110th Congressional session, Senator John Kerry and Senator Lisa Murkowski introduced the SERV Act (Services Education & Rehabilitation for Veterans Act).²⁰⁶ The act sought to create federal funding for research and support of veteran courts through the National Drug Court Institute (NDCI).²⁰⁷ The bill signified federal recognition of a need to support the veterans who, due to their PTSD and substance abuse issues, end up facing criminal charges.²⁰⁸ However, on September 26, 2008, the SERV Act was referred to the House Committee on the Judiciary where it has effectively been stalled.²⁰⁹

The U.S. Department of Veterans Affairs supports the Veteran Court movement. It initiated the Veteran Justice Outreach Initiative, a program to help “avoid the unnecessary criminalization of mental illness and [the] extended incarceration among veterans.”²¹⁰ This outreach initiative seeks to help connect the VA medical services to state court programs that assist in the treatment of justice-involved veterans. Therefore, veterans regardless of their financial status can participate in the treatment program. This is important because if the veteran was sentenced to a term of probation or required to receive psychological treatment by court order, the veteran would typically have to find the means to afford those

201. Judge Hawkins, *supra* note 187, at 570.

202. *Id.* at 565.

203. *Id.* at 570.

204. Judge Russell, *supra* note 8, at 364.

205. *Id.* at 566 (noting that Tulsa, Oklahoma; Orange County, California, Connecticut, Illinois, Nevada have begun Veteran Courts).

206. SERV Act, S. 3379, 110th Cong. § 2 (2008).

207. *Id.*

208. *Kerry, Murkowski Bill will Create Veteran Treatment Courts*, JOHN KERRY.COM, July 31, 2008, [available at](http://www.johnkerry.com/news/entry/kerry_murkowski_bill_will_create_veteran_treatment_courts/) http://www.johnkerry.com/news/entry/kerry_murkowski_bill_will_create_veteran_treatment_courts/ (last visited on Nov. 14, 2010).

209. GovTrack.us, H.R. 7149: SERV Act, 110th Congress (2007-2008), [available at](http://www.govtrack.us/congress/bill.xpd?bill=h110-7149) <http://www.govtrack.us/congress/bill.xpd?bill=h110-7149>. Once a bill is assigned to a committee, the committee can either (1) consider the bill and report favorably or unfavorably or (2) not consider the bill, which effectively stalls the bill in the House. The bill will not move to the Senate if it stalls in the House.

210. *Veteran Justice Outreach Initiative*, U.S. DEP'T OF VETERANS AFF., June 23, 2010, <http://www1.va.gov/HOMELESS/VJO/asp>.

services. The VA's contribution of their medical services is essential to a successful Veteran Court because many veterans face the risk of homelessness upon returning home from war. In 2008, the government stated that there were over 200,000 homeless veterans in the United States, of which the majority were Vietnam veterans.²¹¹ Of those 200,000 homeless veterans, approximately 2,000 individuals served in Iraq or Afghanistan.²¹² The veterans' lack of financial means to afford treatment should not create an obstacle to receiving the necessary care.

C. How the Veteran Specialty Court Works

Admission into the veteran court program is based upon veteran status, service combat, and the filing of non-violent misdemeanor charges.²¹³ However, admission is not automatically based upon 'veteran status.' The prosecutor screens each candidate and has discretion regarding which veterans to place into the court program.²¹⁴ At the outset, the veteran-defendant must show a willingness to undergo treatment for his PTSD. Furthermore, the veteran-defendant must enter into a plea bargain with the prosecutor, admitting guilt to the charged offense. This plea is based upon the willingness of the veteran-defendant to enter into treatment for the underlying PTSD, and thus the prosecutor is willing to forgo requesting a jail sentence. The progress of the veteran defendant is a shared responsibility among many members of the criminal justice system, including the judge, the prosecutor, defense counsel, a probation officer, an individual from the local VA medical facility and a coordinator of the grant organization. This team works together to establish the best course of treatment for the veteran-defendant, and supports him or her in successfully completing the treatment program by overcoming PTSD and often the associated substance abuse.²¹⁵ Under this model, the veteran-defendant is surrounded by a support network of individuals who understand his or her military background, mental health background, and the current daily stressors. A critical element of the veteran court is the mentoring program.²¹⁶ Other veterans in the community volunteer to be the veteran-defendant's mentor. The mentor helps the defendant throughout the treatment process. Although the emphasis of this treatment model is on personal accountability, throughout the entire process the veteran-defendant is not alone.²¹⁷

Due to various state programs only recently initiating veteran court programs, there are currently no national statistics to comment on the success of veteran courts. However, the statistics of the New York Veteran Court are telling. In December of 2008, the Buffalo veteran court had 130 participants. Of those 130

211. Mike Mount, *Homeless Veterans Face New Battle for Survival*, CNN.COM, July 02, 2008, available at http://articles.cnn.com/2008-07-02/us/homeless.veterans_1_homeless-veterans-vietnam-veterans-veterans-affairs?_s=PM:US.

212. *Id.*

213. See Judge Russell, *supra* note 8 at 367-68.

214. *Id.* at 367-68.

215. *Id.* at 365.

216. Judge Hawkins, *supra* note 187, at 569; Judge Russell, *supra* note 10, at 369-70.

217. Judge Russell, *supra* note 8, at 369.

participants, in 2009 the Buffalo court reported that there were fourteen graduates and no recidivists.²¹⁸

D. Arguments Supporting Veteran Courts

The prevalence of state veteran courts signifies the general acceptance of allowing veterans to be subject to different prosecutorial methods than non-veterans. There are four prevalent reasons why many states governments support the veteran court movement: a societal sense of duty to provide support in return for their service; a need to reconcile for the government's insufficient reaction to the return of Vietnam veterans; as a means to provide public safety; and a cost-benefit analysis.

The most common reason for supporting veteran courts is recognition that it is society's duty to care for returning veterans because they fought to maintain our liberties.²¹⁹ The government, through military training and deploying troops into combat, forever morphs civilians into soldiers. On the other end, when the war is completed the government's attempts, albeit unsuccessfully, to aid in the veterans' reintegration into society. The government then punishes the veteran when he or she does not behave as expected in a civil society. Veterans voluntarily choose to sacrifice their lives to fight for the freedom of all Americans, and therefore they should be entitled to differential treatment upon return for their actions that stem from their experiences of war.

Incorporated into this entitlement-responsibility argument is the argument that our Nation failed to provide support for past veterans, and therefore it is now time to start doing the appropriate, just action by providing the appropriate treatment.²²⁰ Research results exemplify that societal support of veterans upon homecoming is an influential element affecting the success of PTSD treatment.²²¹ For example, the NVVRS study found that "social support plays a critical role in reducing PTSD symptoms and increasing one's level of functioning."²²²

Thirdly, many believe that veteran courts work to enhance public safety. If we do not provide treatment for individuals suffering from PTSD and substance abuse, then there will be high levels of veteran recidivists. On the other hand, if we provide treatment and rehabilitate these individuals, then there would be more productive members of society.²²³ A similar argument was put forth to support the drug court movement. It is based upon recognition that the traditional prosecution model is not an effective way to create productive members of society because it does nothing to treat the underlying problems causing involvement in the criminal

218. Judge Hawkins, *supra* note 187, at 566.

219. *Id.* at 569.

220. *See id.* at 569.

221. Koenen et al., *supra* note 35, at 980, 984-85.

222. Price, *supra* note 49; *see also* Koenen et al., *supra* note 35, at 984 (stating that "[t]hose that were involved in community in 1984 were also more likely to show remission in PTSD than were those with less community involvement").

223. *One in Five*, *supra* note 24.

justice system, thereby resulting in recidivism.

Lastly, veteran courts find support based upon a cost-benefit analysis argument. In short, it is cheaper for society to treat and rehabilitate veteran-defendants than to continuously pay for their repeated incarceration in the criminal justice system or to pay for the costs associated with supporting an unproductive member of society.²²⁴ Society, through taxes, bears the cost of caring for veterans of war through treatment of physical and psychological wounds and by providing social services to the veterans whom do not seek care and suffer from prolonged PTSD symptoms, such as homelessness, suicides, drug abuse, or incarceration.²²⁵ The RAND study concluded that it is *more* expensive for society to deal with an unproductive member of society than provide adequate treatment services to veterans in need.²²⁶ The RAND study estimated that in the current state of available mental health care,²²⁷ within two years following deployment, PTSD and depression among veterans would cost the United States approximately 6.2 billion dollars.²²⁸ This dollar amount includes both direct medical costs and indirect costs, such as the cost for the loss of productivity among veterans in society and the costs of suicide.²²⁹ Veteran courts provide an alternative means of treatment for veterans, beyond the VA, that do not necessarily require more taxpayer funds for support. The VA Justice Outreach Initiative aids in the state court veteran programs by providing the required resources for treatment. Therefore, the establishment and proliferation of the veteran courts is not creating an additional cost for society to bear. In fact, by offering treatment to get to the source of the criminal behavior recidivism will decline and eventually result in fewer veterans interacting with the criminal justice system.

Since veteran courts are nascent, statistics regarding the amount of money saved by incarcerating fewer veterans is unavailable. However, statistics of drug court savings are telling: a study of the New York drug courts found that by allowing 18,000 individuals into the drug court program, instead of incarceration, the state saved approximately \$254 million dollars in incarceration costs.²³⁰ The treatment provided by the veteran courts and the reduction in incarcerating veterans will save both the state and federal government money. Due to different political views regarding the propriety of war and the use of military forces, many can disagree with the responsibility/entitlement arguments. However, regardless of differing ideological views, the public safety and cost-benefit arguments benefit society as a whole.

E. Opposition to Veterans Courts

224. *One in Five*, *supra* note 24; RAND *supra* note 2, at 170-71, 438-40.

225. RAND *supra* note 2, at 170-71, 438-40.

226. *Id.*

227. *Id.*

228. *Id.* at 171.

229. *Id.* at 170-71.

230. Judge Russell, *supra* note 8, at 371.

The establishment of veteran courts has not gone without opposition. Some disagree with allowing the criminal justice system to treat veterans differently than other criminal defendants.²³¹ Inherent in this opposition is the belief that the government, through creation of specialty courts, is beginning to create a class-based criminal justice system. Civil liberties groups, such as the ACLU, object to the creation of veteran courts because admission into the program requires a veteran status.²³² The groups view the veteran court as creating advantages for veterans that non-veterans cannot utilize. Therefore, it creates a disadvantage to those who are not veterans but still suffer from PTSD, and who would benefit from treatment over incarceration. About eight percent of the American population suffers from PTSD with lifetime prevalence.²³³ The government is arguably creating a first-class and second-class criminal-justice system, based upon determining who is more deserving of treatment: non-veterans who suffer from PTSD or veterans who suffer from PTSD. However, the counterargument is that individuals who are not veterans, but who suffer from mental illnesses or PTSD, along with substance abuse, can take advantage of the drug-court programs that almost all judicial jurisdictions within states now maintain.

Others believe that veteran courts are unnecessary due to the already present leniency towards veterans in the court process. For example, judges have the discretion to take into account the veterans' military disabilities, including PTSD, during sentencing.²³⁴ However, the scope of the courts' relief, when considering a veteran-defendant's PTSD, is not far-reaching. As discussed in Part 2, mental health defenses based upon PTSD are typically unsuccessful. Furthermore, PTSD as a consideration of mitigation usually only minimizes the sentence and the veteran-defendant still faces incarceration. If incarcerated, these veteran-defendants will not receive the necessary psychological treatment.

Lastly, some argue that the legislative creation of special prosecution alternatives that follow the therapeutic jurisprudence ideology, such as drug courts or veteran courts, is solely a way for the government to displace its responsibility upon the criminal defendants.²³⁵ For example, drug courts emerged due to the increase of drug use in urban areas of America. The high rate of drug use in urban areas is due to a lack of general social services in these communities to aid the poor in attaining a higher economic status.²³⁶ Instead of accounting for the government's failure to increase the availability of resources (i.e. access to education, available healthcare, housing, or employment opportunities), the drug court model made the defendant take responsibility for his or her life choices and

231. Judge Hawkins, *supra* note 187, at 570; see *Returning Veterans*, *supra* note 35, at 14.

232. Judge Hawkins, *supra* note 187, at 570; Dahlia Lithwick, *A Separate Peace: Why Veterans Deserve Special Courts*, NEWSWEEK, Feb. 11, 2010, <http://www.newsweek.com/2010/02/10/a-separate-peace.html>.

233. Gover, *supra* note 15, at 565.

234. Judge Hawkins, *supra* note 1787, at 571.

235. Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 Stan. L. & Pol'y Rev. 417, 437.

236. *Id.* at 432-35.

made it the defendant's goal to overcome his or her environment on their own.²³⁷ This is called the 'responsibilization' strategy, where the government places the responsibility on the individual to change their individual conduct, rather than addressing the lack of general rights and availability of governmental social services that affect the lifestyle of the individual.²³⁸

The same argument is applicable to veteran courts. Like the drug courts, state judiciaries and legislators initiated veteran courts by recognizing the increase of veterans in our criminal justice system. However, the increase of the number of veteran defendants directly relates to their lack of treatment.²³⁹ As noted above, the stigmatic mental health and the systematic barriers surrounding the access to mental health care creates obstacles to receiving treatment. The Department of Defense has recognized that the available treatment it is providing American veterans is "insufficient."²⁴⁰ The creation of veteran courts could be a political decision on behalf of the government to displace its responsibility for failing to provide adequate treatment for veterans' mental health issues caused by their service onto the individual defendant-veteran.

While this argument is persuasive, it does not take into account the pressing need to treat PTSD or the potential length of time it would take the government to implement positive and noticeable changes in the availability and sufficiency of the social services provided to veterans. The establishment of the veteran court, although arguably allowing the government to pass-the-buck might be the best option available.*F. International Guidance: Are Veteran Specialty Courts the Right Solution?*

Thus far, this paper has primarily focused on the effects of PTSD on American soldiers. Despite this emphasis, American soldiers are not alone in their battle to overcome the psychological wounds endured from war. As mentioned previously, the psychological wounds of war are an inherent part of the very act of war. Therefore, soldiers from any conflict, which includes combat, will likely battle with a variety of psychological wounds.

In the current state of international affairs, many countries are joining forces to fight the same causes, whether it be the global war against terrorism or global efforts to provide humanitarian aid to countries in need. The numerous countries whose soldiers fight in combat, and as a result have PTSD, may benefit from addressing the issue as an international community. The United States, in the implementation and progression of Veteran Specialty Courts, could lead the international community in providing appropriate treatment and care for its soldiers.

How do other countries respond to the needs of returning veterans? Speaking

237. *Id.* at 423.

238. *Id.* at 425.

239. *See One in Five*, *supra* note 24.

240. Judge Russell, *supra* note 8, at 360.

in generalized terms, there is not a plethora of literature relating to the prevalence and treatment of PTSD among non-U.S. armed forces. However, from the academic or news articles available, there are noticeable trends in the way that non-U.S. military forces view the veterans' difficulties with PTSD.

Before discussing the trends, it is important to note that the amount of armed forces the U.S. military utilizes in armed conflicts is, in general, exponentially greater than most non-U.S. military forces. For example, since 2001 the United States sent approximately 1.6 million soldiers to serve in the OEF and OIF wars.²⁴¹ Germany reports that it has sent approximately 3,400 German army troops to Afghanistan.²⁴² This discrepancy in size and utilization does affect the prevalence of PTSD and therefore the amount of concern a country places upon this problem.

The first notable trend is that many non-U.S. militaries, such as Germany, France, and Britain, turn to the United States for guidance on the method of addressing and treating PTSD among their troops.²⁴³ The United States began researching the psychological effects of war after the Vietnam War, and the APA made it an official diagnosis in 1979.²⁴⁴ The United States is arguably ahead of other countries in academic research, statistics, and treatment methods of PTSD.

France, for example, has not conducted any research that has produced statistics regarding the prevalence of PTSD among its armed forces.²⁴⁵ Rather, it looks to the United States statistics when deciding to implement mental health programs.²⁴⁶ However, France's procedure for dealing with veterans returning from combat is somewhat different from that used in the United States. France passed a new rule in June of 2010 that requires all returning soldiers to spend three days with Cispata, the French Army's psychological intervention unit, prior to returning to their civilian lifestyles.²⁴⁷ The justification for the three-day time-span is to provide the armed forces with a buffer period between combat and returning home to assist in addressing possible mental health issues.

Unlike France, Germany has conducted studies of its soldier population and determined that the number of German soldiers with PTSD has tripled in the last two years.²⁴⁸ Due to this concerning rise, Germany is in the initial process of

241. RAND, *supra* note 2, at 3.

242. Marcus Klockner, *German Army PTSD Cases on Rise*, STARS AND STRIPES, March 2009, available at <http://www.stripes.com/news/german-army-ptsd-cases-on-rise-1.89317>.

243. See e.g., *id.*; Perrine Mouterde, *Soldiers Confront the Psychological Cost of War*, FRANCE24.COM, Nov. 2010, available at <http://www.france24.com/en/20101125-french-soldiers-confront-psychological-issues-battlefield-afghanistan-trauma-military>; Aaron Levin, *Combat Reactions Oceans Apart for British, U.S. Soldiers*, 45 PSYCHIATRIC NEWS No. 24, Dec. 2010, available at <http://pn.psychiatryonline.org/content/45/24/6.1.full>.

244. RAND, *supra* note 2, at 5.

245. Perrine Mouterde, *Soldiers Confront the Psychological Cost of War*, FRANCE24.COM, Nov. 2010, available at <http://www.france24.com/en/20101125-french-soldiers-confront-psychological-issues-battlefield-afghanistan-trauma-military>.

246. *Id.*

247. *Id.*

248. Klockner, *supra* note 242.

researching the causes and effects of PTSD among its soldiers. Germany turned to the United States for guidance on the methods of treatment and the administration of financial aid to support the health care of its suffering soldiers.²⁴⁹ A member of the German parliament expressed how impressed he was with the treatment and the amount of financial aid the United States provides for its returning soldiers.²⁵⁰ While research regarding the proper treatment of PTSD is underway, the German military utilizes a "Warrior Adventure Quest" program that assists soldiers' transition back into civilian life after serving in war.²⁵¹ This program allows soldiers to participate in adventure activities such as rock climbing, whitewater rafting and mountain biking. These activities build mental resilience in soldiers by introducing them to a stressful event and assisting the soldiers in overcoming the stress through utilization of different coping strategies.²⁵² The soldiers usually attend the program with other soldiers whom they have served and the soldiers participate in the program one time a month, for a few months. Beyond assisting soldiers in coping with the stresses of war, Germany recently introduced a law that guarantees post-service employment for soldiers who are severely wounded in war.²⁵³ It is unclear at this stage of the development of the law whether 'severely wounded' also includes mental inflictions.

Britain has also conducted a study that compared the psychological combat reactions of British soldiers and American soldiers.²⁵⁴ British researchers utilized the comparison to research the contributing factors of PTSD because the two armed forces have many similarities.²⁵⁵ For example, both armed forces are western armies whom fight against the same enemy, in the same environment. The two armed forces also report the same mortality casualties.²⁵⁶ Despite these similarities, the rate of PTSD among British soldiers is strikingly lower than that of United States soldiers. Approximately 2% to 3% of British soldiers suffer from PTSD while approximately 12% to 15% percent of American soldiers suffer from the mental illness.²⁵⁷

The research concluded that the differences in the prevalence of PTSD between the two countries are attributable to the cultural traditions of the two

249. *Id.*

250. *Id.*

251. Seth Robinson, *Army uses Adventure Activities to Fight PTSD*, STARS & STRIPES, Jan. 2009, available at <http://www.militaryconnection.com/articles%5Chealth%5CCarmy-adventure-fight-ptsd.html>.

252. *Id.*

253. EUROMIL Workshop: Challenges of European Soldiers in the Field: The Human Factor in Modern Military Missions, Paris, Oct. 25, 2007, available at <http://www.acmpcpgm.be/Documenten/Euromil/EUROMIL%20WORKSHOP.pdf>.

254. Aaron Levin, *Combat Reactions Oceans Apart for British, U.S. Soldiers*, 45 PSYCHIATRIC NEWS No. 24, Dec. 2010, available at <http://pn.psychiatryonline.org/content/45/24/6.1.full>.

255. *Id.*

256. *Id.*

257. *Id.*

countries and the different types of stressors.²⁵⁸ For example, the United States military uses more reservist soldiers than Britain.²⁵⁹ The United States deploys its soldiers for a longer period of time than Britain.²⁶⁰ Lastly, the United States soldiers do not have as much dwell time (time in between deployment, home stay, and return to combat) as British soldiers. In Britain, once returning from deployment, the soldiers stay at home twice as long as their deployment period.²⁶¹ In America, the majority of soldiers are home for approximately one year or less before returning to the war.²⁶²

Despite the reduced percentage of British soldiers suffering from PTSD, the research concluded that substance abuse problems were fewer among United States soldiers than among British soldiers.²⁶³ Approximately fifteen to twenty percent of British active soldiers suffer from alcohol abuse problems.²⁶⁴ The research attributed this high percentage of alcohol abuse to the lack of a cultural stigma against alcohol.²⁶⁵ The study also recognized that both cultures have a stigma surrounding the use of mental health to treat psychological problems.²⁶⁶ Both soldiers are reluctant to seek and utilize mental healthcare.²⁶⁷

An interesting side-note of the research is that the British researchers found an increase in the rates of psychological problems among British soldiers when their service in Iraq was spontaneously extended without warning.²⁶⁸ It was determined that surprise and unsatisfied expectations contributed to the rise in the PTSD rate.²⁶⁹

The second noticeable trend is that European countries are joining forces in a multi-national effort to address the problem of PTSD among its soldiers. Thirty-six military associations have unified to create EUROMIL (the European Organisation of Military Associations).²⁷⁰ The mission of EUROMIL is for European countries to work together to promote the social and professional interests of approximately 500,000 soldiers from twenty-four different countries, which includes the promotion of mental health.²⁷¹ EUROMIL recognizes PTSD as an occupational sickness and therefore is working together to guarantee long-term medical treatment of the participating countries' soldiers.²⁷² Similar to the United States,

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *See e.g.*, RAND *supra* note 3, at 23-24.

263. Levin, *supra* note 257.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. Levin, *supra* note 42.

269. *Id.*

270. EUROMIL, *supra* note 253.

271. *Id.*

272. *Id.*

EUROMIL believes that a soldier's physical health and psychological health are pre-requisites for military effectiveness.²⁷³

Lastly, the United States is not alone in its concern of the number of veterans in its criminal justice system. Britain has reported that an alarming large number of its veteran population is in the British criminal justice system.²⁷⁴ In its 2009 report titled *Armed Forces and the Criminal Justice System*, the National Association of Probation Officers (NAPO)²⁷⁵ reported that at any one time, there are approximately 8,500 British veterans in custody following a criminal conviction.²⁷⁶ Furthermore, the report noted that there are approximately 12,000 British veterans under supervision of probation officers, which includes community sentences and individuals on parole.²⁷⁷ The majority of the incarcerated British veterans were convicted of violent offenses with a "direct link to drug or alcohol misuse."²⁷⁸ While NAPO did not provide any statistical evidence regarding how many of the 8,500 suffered from PTSD, it did note that "most of the soldiers who had served in either Gulf War or Afghanistan were suffering from PTSD."²⁷⁹

NAPO criticized the lack any systematic psychological support and treatment methods available to the returning British veterans.²⁸⁰ NAPO argued for an increase of psychological support through the availability of support services both at the time of discharge and at the initial encounter with the criminal justice system.²⁸¹ If these support services were available, and the underlying PTSD and/or substance abuse was addressed early on, NAPO noted that custody of veterans would not be necessary.²⁸² NAPO argued that an increase in support services to British veterans would be in the best interest of the public and would reduce taxpayer money both in the short and long term.²⁸³ The unspoken British "military covenant," the military's guarantee that the soldiers will receive fair treatment in return for putting their lives on the line, also supports the increase of psychological services for the veterans.²⁸⁴

273. *Id.*

274. Harry Fletcher, *Armed Forces and the Criminal Justice System: A Briefing from NAPO, the Trade Union and Professional Association for Family Court and Probation Staff* September 2009, NAPO, Sept. 2009, available at <http://www.napo.org.uk/about/veteransincjs.cfm>. NAPO is a non-governmental trade union, professional association and campaigning group. The group works to provide policy briefs in support or opposition to various parliamentary acts.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. Ben Leach, *Thousands of War Veterans Locked in British Prisons*, THE TELEGRAPH, Aug. 30, 2008, available at <http://www.telegraph.co.uk/news/newsttopics/onthefrontline/2651148/Thousands-of-war-veterans-locked-in-British-prisons.html>.

In response to the NAPO criticism of the available health care, a Ministry of Defense spokesman noted “[r]obust systems are in place to treat and prevent PTSD and other stress disorders. Counseling is available to service personnel at all times and all troops receive pre- and post-deployment briefings to help recognise the signs of stress disorders.”²⁸⁵

However, not all members of the parliamentary share the Ministry of Defense spokesman’s view. In response to the NAPO report, the following year the Veterans Parliamentary Group produced the *Coordinated National Action Plan* (Plan) to implement a national strategy to deal address the large number of British forces that are incarcerated or are in probation’s control.²⁸⁶ The goal is to reduce the large number of British veterans in the criminal justice system and to reduce recidivism through providing adequate treatment.²⁸⁷ The aims of this national movement were to provide adequate psychological services at two stages: (1) during and after military service, and (2) at the initial contact with the criminal justice system and while incarcerated or on probation.²⁸⁸ The Plan listed specific strategies for the criminal justice system to implement. For example, at the veteran’s initial encounter with the criminal justice system, the officials should ask if he or she has a service record.²⁸⁹ If so, the veteran’s service record should be a part of the court record and given to all participants in his or her case.²⁹⁰ Once identified as a veteran, the veteran should be referred to relevant treatment and counseling agencies.²⁹¹ If as a result of the veteran’s charged crime, he is sentenced to incarceration, while in incarceration the veteran should be provided with knowledge of where to seek counseling and treatment services while incarcerated.²⁹² Furthermore, while incarcerated the veteran should be given the opportunity to attend monthly group meetings discussing substance abuse.²⁹³ To effectively implement the above changes to the criminal justice system, the Plan proposed funding for a “National Veteran Support Officer” for each prison and probation office in order for the veteran to have a services liaison.²⁹⁴

It is clear from researching the different responses to PTSD that the United States is ahead of the rest of the world in its response to PTSD among its soldiers. This is arguably attributed to the higher frequency of involvement of the United States in armed conflict compared to other countries. Despite the media and societal critique of the United States adequacy of treatment for its wounded troops,

285. *Id.*

286. NAPO et al., *Veterans in the CJS: Coordinated National Action Plan*, Justice Unions Parliamentary Group, June 2010, available at <http://www.telegraph.co.uk/news/newstoppers/onthe frontline/2651148/Thousands-of-war-veterans-locked-in-British-prisons.html>.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

the United States, through the VA and now through the judiciary, arguably offers the best overall treatment of PTSD among the international community.

CONCLUSION

This article is a call to recognize and address the invisible. All too often PTSD is overlooked and ignored because it is an invisible wound on the mind. Neglecting PTSD drives our veterans to the margins of society, where they become invisible to the community as they are incarcerated or beset by extreme poverty. Thus, the only visible manifestations of PTSD are reports containing statistics about the number of veterans succumbing to suicide, homelessness, and crime. It is only by recognizing the invisible wounds of the mind that we can begin to adequately recognize and thank our veterans.

PTSD, as a stressor of war, is as old as war itself. It is not a new phenomenon, yet surprisingly the United States, and other countries around the world, have yet to find a workable solution to address the health care needs of veteran's inflicted with PTSD. This lackadaisical approach to providing treatment for veterans returning from war with a mental infliction is no longer acceptable. The lack of available and adequate treatment for veterans suffering from PTSD undoubtedly contributes to the severity of the PTSD and the resulting criminal liability. As mentioned previously, the symptoms of PTSD grow more severe the longer one suffers without treatment. Courts and researchers recognize a valid link between the suffering from PTSD and their related criminal behavior. These veterans are not predisposed career-criminals, and typically do not have a criminal record prior to service.

The United States government has attempted to provide services to the returning soldiers, however, for the reasons stated in this article, those services have fallen short. Furthermore, only recently has the government and society recognized the rising numbers of veterans in the criminal justice system. Treating the veteran's underlying PTSD upon return from combat is an imperative prerequisite to preventing substance abuse and criminal behavior.

While the current system requires comprehensive changes, the United States simply cannot begin to re-build and re-administer the VA. This would not address the current treatment needs of the veterans from the OEF, OIF and Vietnam wars. To go down this route, would be to leave another generation of veterans in the shadows. However, the creation of Veteran Specialty Courts across the country is an immediate response to what has been described as a social crisis. Potentially, with the increase of drone warfare and the ongoing researching of TBI and its affects upon the mind, the gravity of this social crisis could exponentially increase.

The Veteran Specialty Courts are workable and cost-effective solutions to the current problem. Modeled after the drug-court system, the Veteran Specialty Courts will address the underlying PTSD of the veteran-defendant. Theoretically, these courts will stop the domino effect of a veteran suffering from PTSD, abusing substances, and acting out in criminally liable ways which has produced the current state of affairs. Veteran Specialty Courts will save the financial toll of society in incarceration costs. But most importantly, Veteran Specialty Courts will

save the quality of a veteran's life, the same veteran who fought to save American lives and liberties.



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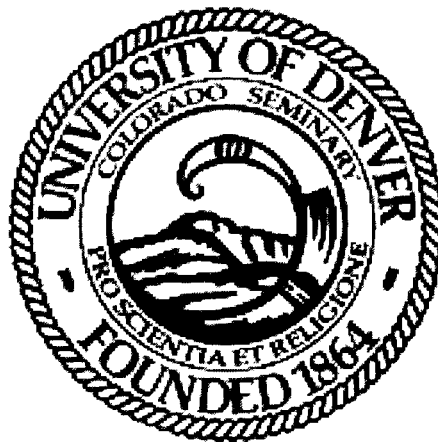
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